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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

GEORGE V. TAWES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Compagnie Generale Transatlantique, a corporation organized and existing under the laws of the Republic of France, with respect shows:

A.

Summary Statement of Matter Involved.

This is an application for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Fifth Circuit which affirmed a judgment of the United States District Court for the District of the Canal Zone on a jury verdict in favor of the defendant.

The cause of action arose on February 17, 1935, when petitioner's Steamship WISCONSIN, in transit through the

Panama Canal in charge of George V. Tawes, a compulsory Canal Zone pilot, was grounded allegedly through the negligence of Tawes. Damages amounting to $12,731.83 were sustained by the vessel. Originally petitioner brought suit against the Governor of the Panama Canal, the Panama Canal, and against Tawes, the pilot, to recover the damage and expense caused by Tawes' allegedly negligent stranding of the vessel. The Governor of the Panama Canal and the Panama Canal excepted to the jurisdiction, the lower court ruled in their favor, dismissing the complaint as against them, the Circuit Court of Appeals for the Fifth Circuit affirmed, *Compagnie Generale Transatlantique* v. *The Governor of the Panama Canal and the Panama Canal*, 90 F. (2d) 225, and this Court denied certiorari No. 288, October Term, 1937, 58 S. C. 41, 302 U. S. 720, 82 L. Ed. 556. The Governor of the Canal and the Canal itself being thus out of the case, the case then went back to the District Court for the Canal Zone, proceeded to trial as against the remaining defendant, Tawes, the pilot who had stranded the ship, and a jury verdict resulted exonerating him. From the judgment on this verdict the petitioner then again appealed to the Circuit Court of Appeals for the Fifth Circuit, where the judgment for the defendant, Tawes, was affirmed, 111 F. (2d) 92. Rehearing was denied (R. 103).

On February 17, 1935, the WISCONSIN was at Cristobal, at the Atlantic end of the Panama Canal, bound for the Republic of Salvador, on the Pacific side. In order to pass through the Canal, the vessel was required by the rules and regulations of the Canal to have a Panama Canal pilot on board (R. 72). Tawes was assigned by the port captain at Cristobal to pilot the vessel through the Canal (R. 63). Under the regulations of the Canal, chapter 4, rule 30, the master of the ship was specifically forbidden to give or cause to be given any order concerning the movement of the vessel without the knowledge of Tawes or against his advice (R. 13).

In making the passage through the Canal, the vessel encountered occasional patches of fog. Chapter 6, rule 58, of the rules and regulations governing navigation of the Canal provided that a vessel under way "when overtaken by thick or foggy weather, or rain so dense as to obscure the vision, shall immediately take every precaution necessary for safety, and anchor or moor at the first available place" (R. 14). In compliance with this rule, when he reached the first patch of fog, Tawes brought the vessel to a stop until the fog cleared (R. 64). After the fog there had lifted, he resumed his trip through the Canal and a few miles farther on again met fog, and again brought the vessel to a stop (R. 35, 64). When this second fog had cleared sufficiently, Tawes put the vessel under way again, met a third fog, and for the third time brought the vessel to a stop (R. 36, 65). When this third fog had cleared sufficiently, Tawes got the vessel under way again. The particular stretch of the Canal at which he was then navigating is known as San Pablo Reach, at the eastern end of which the Canal makes a turn of about 51 degrees into a portion of the Canal known as Mamei Curve. In making the turn from San Pablo Reach into Mamei Curve, Tawes knew that he was likely to encounter fog, but none the less continued the vessel on her way, and stranded her in the fog (R. 47, 65, 70, 74, 76, 78, 79).

In its complaint against Tawes to recover the damage caused to the vessel by the stranding, petitioner charged among other things (R. 4, 5) that Tawes failed to stop the vessel and anchor her when overtaken by a fog so dense that visibility was shut out, proceeding impossible, and navigation dangerous, that he had failed to reverse the engines and put the vessel astern when warned by the chief officer on the forecastle head that the vessel was headed toward land, that he carelessly, recklessly, and negligently navigated the vessel through a fog so dense that he could neither see the channel nor navigate the vessel to

conform to the channel, and that he failed to stop said vessel and anchor or moor it as required by the rules governing the navigation of the Canal.

The points on which review by this Court is sought appear in the record at pages 28, 29, and 30. The first two of these points refer to exceptions to the charge of the trial court, the third to the trial court's error in not holding that the verdict of the jury was contrary to the law as given by the court in its instruction number 1 (R. 13, *et seq.*), and, finally, the trial court's error in not holding that there was a total absence of substantial evidence on which the verdict of the jury could be based.

In instruction number 3 the trial court instructed the jury as follows (R. 15):

> "The Court instructs the jury that although it was the duty of defendant George V. Tawes, as set forth in Instruction No. 1, when overtaken by thick or foggy weather to immediately take or direct every precaution necessary for safety and anchor or moor the vessel at the first available place, yet, if you further believe from the evidence that the defendant, George V. Tawes, while exercising ordinary care and skill and all of the duties required of him by Instruction No. 1 on the steamship *Wisconsin* it was suddenly overtaken by fog so thick and dense that his visibility of navigating aids was obscured and that the defendant by the exercise of ordinary care and skill could not have anticipated this situation and condition before it happened, and if you further believe that the defendant, George V. Tawes, when confronted with this situation and condition then used ordinary care and skill for the safety of the vessel and to prevent grounding of same, but by the use of ordinary care and skill he was unable to do so and the vessel went aground, then the law is for the defendant and the jury should so find."

In the first place, this charge submitted to the jury a theory of the case based on the idea that if the jury believed that

the accident was, because of fog, unavoidable by the use of ordinary care, the pilot should be exonerated. In other words, it submitted to the jury a defense of unavoidable accident, a defense which was nowhere raised by the defendant's pleadings. The charge also was inherently and fatally inconsistent. In its first part it instructed the jury that it was the duty of Tawes, when overtaken by foggy weather, to take every precaution necessary for safety, and to anchor or moor the vessel at the first available place. The court, however, went on to add that if Tawes was suddenly overtaken by fog obscuring visibility, and if he could not have anticipated this situation, he was then only required to use ordinary care and skill to prevent the grounding. In other words, in one moment the trial court instructed the jury that Tawes had to anchor or moor the vessel at the first available place, and in the next moment charged, in effect, that confronted with the fog situation, he could proceed, using "ordinary care and skill". Further, this charge is based on a theory that there was evidence on which the jury might find that Tawes, by the exercise of ordinary care and skill, could not have anticipated that he would be overtaken by fog so thick and dense as to obscure visibility. There is absolutely no evidence in the record to support such a finding. On the contrary, the record is all one way and is to the effect that his visibility had been shut out on three prior occasions that same morning to such an extent that he had had to stop the vessel each time. Finally, the charge stated that if when confronted with the fog Tawes used ordinary care and skill, he was not liable. This is a most serious understatement of the pilot's duty. It was the pilot's duty to use the extraordinary care required by the extraordinary circumstances.

In instruction number 5 the court charged (R. 17):

> "The burden of proof in this case is upon the plaintiff, and unless you are reasonably satisfied by a pre-

> ponderance of the evidence that the plaintiff is entitled to recover, you should find for the defendant. If, after considering all the evidence, your minds are left in a state of reasonable uncertainty as to whether or not plaintiff is entitled to recover, your verdict should be for the defendant."

No doctrine of law is more clearly or firmly established than the rule that in civil cases the issues of fact are to be determined in accordance with the preponderance of the evidence. Proof beyond a doubt or "beyond a reasonable uncertainty" is not necessary in a civil action, and the charge in question placed upon the petitioner a burden which it did not and clearly could not have.

On motion for a new trial (R. 25) the petitioner urged that the verdict was obviously contrary to the law as given by the court to the jury in its instruction number 1 (R. 13). The undisputed fact situation disclosed by the evidence exactly fitted this charge, but in the face of the uncontroverted evidence that Tawes failed to anchor the vessel, that he proceeded in the fog at the rate of 6 knots or better without the vaguest idea where the vessel was, that he grounded the vessel not on any unknown or obscure obstruction but on the bank of the Canal, the jury found for Tawes. The verdict, rendered as it was in obvious disregard of the law as given by the trial court in this charge, should have been set aside. Finally, petitioner on the trial moved for a new trial on the ground that the evidence was insufficient to support the verdict in that there was a lack of substantial evidence on which the verdict could be based. The only evidence adduced on behalf of Tawes was that of Tawes himself. He testified that although he had been encountering fog off and on all morning, that although he had been forced to stop on three occasions on account of fog, and although he had been navigating in patches of fog in San Pablo Reach, he did not

stop to get his bearings before making the turn into Mamei Curve (R. 74). His supposed exculpatory evidence does not exculpate him; yet in disregard of these undisputed facts the jury exonerated Tawes. Its verdict clearly has no evidence to support it and should not have been allowed to stand.

B.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been but Should Be Settled by This Court.

This case involves the question of the extent of the pilot's liability for damage to the vessel which he is piloting. The questions involved here have never been directly passed upon by this Court. It is respectfully submitted that this court should pass upon the duties of the pilot to the vessel in the circumstances shown by the facts of this case. This Court should pass upon the question of whether or not the pilot, in fog, is required to use only "ordinary care and skill" as set forth in the trial court's charge or whether he is required to use the extraordinary care required by the extraordinary circumstances. This Court should also pass upon the confusing and prejudicial instruction given by the trial court that petitioner was required to convince the jurors beyond a reasonable uncertainty, a burden not required by any known form of civil practice. Finally, an examination of the evidence should be made by this court. We submit that it would disclose the verdict to have been obviously contrary to instruction number 1 as given by the trial court and wholly unsupported by any substantial evidence.

Wherefore your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to

this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings numbered and entitled on its docket, No. 9080, Compagnie Generale Transatlantique, Appellant *v.* George V. Tawes, Appellee; and that the said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just.

Respectfully,

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